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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

CLIFFORD DOYLE LEE,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in denying the Petitioner's Motion to Suppress Evidence due to the constitutional insufficiency of an affidavit. The affidavit did not establish the probable cause necessary to find Petitioner was involved in violations of federal narcotics laws.

2. Whether Petitioner's warrantless arrest, based on information from an untested source, meets the requisite requirements for probable cause.

3. Whether the Court of Appeals erred in admitting the oral statement given by Petitioner subsequent to his arrest in direct contravention of *Miranda v. Arizona.*

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The Petitioner, Clifford Doyle Lee, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals entered on September 10, 1981.

OPINION BELOW

The Memorandum Opinion and Order of the Court of Appeals for the Ninth Circuit appear in the Appendices attached hereto.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 10, 1981. Petition For Rehearing was denied on November 12, 1981. Jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATEMENT OF THE CASE

Petitioner and two Co-Defendants were arrested without a warrant on September 14, 1979, for violation of federal narcotics laws. The arrest occurred in Sparks, Nevada. Petitioner Lee was convicted after trial by jury of possession of a controlled substance with intent to distribute, in violation of 21 USC § 841(a)(1), and conspiracy to possess and distribute a controlled substance in violation of 21 USC § 846.

Petitioner filed a pretrial Motion to Suppress the evidence on November 20, 1979. A Minute Order denying Petitioner's Motion was filed on January 11, 1980. The Order was devoid of any discussion of facts or applicable case law supporting the Court's decision.

Sometime in August of 1979, Drug Enforcement Administration (hereafter referred to as "DEA") Agents began a dialogue with Kenny Anderson, incarcerated in the Clark County jail for burglary. Anderson, an untested source, provided information to the DEA Agents about a warehouse burglary which occurred on March 25, 1979. The burglary involved ten slot machines which were taken from the Golden Nugget Casino in Las Vegas. Anderson was currently serving time as a result of the above-mentioned burglary. He informed the Agents that Petitioner, Clifford Lee, was in possession of approximately five of the stolen slot machines and at some time in the future, the machines would be exchanged for narcotics. The information regarding the burglary of the Golden Nugget Casino was verified by the DEA Agents. The Agents were not able to verify that Petitioner Lee was in possession of the five slot machines.

Anderson provided the DEA agents with additional information including the fact that Petitioner would be contacting his source for amphetamines in Oregon.

Independent evidence established that Lee had visited Anderson in the Clark County Jail on several occasions. However, there was no evidence to establish whether Anderson spoke with Lee immediately preceding the trip from Las Vegas to Reno, Nevada, where Petitioner was arrested.

From the information provided by Anderson, the DEA Agents conducted spot surveillance on various vehicles that might be used to transport the stolen slot machines to Oregon. Anderson apprised the DEA Agents that the slot machines would be moved from Las Vegas to Oregon in the near future, without specifying a date or time.

On September 14, 1979, the DEA Agents were advised that one of the vehicles under surveillance, a 1979 Cadillac El Dorado, pulling a U-Haul trailer, was presumably en route to Oregon.

Las Vegas DEA contacted the Reno DEA with the information that the Cadillac towing the U-Haul was seen going north toward Reno. The Las Vegas DEA requested surveillance of the automobile by Reno DEA Agents.

Upon reaching the Reno city limits, the driver of the Cadillac pulled into a service station. After servicing the vehicle, the driver proceeded to the MGM Grand Hotel in Reno, Nevada, where the car and trailer were parked in the hotel parking lot.

The driver of the vehicle, later identified as the Petitioner, Clifford Lee, left the vehicle and entered the casino. Petitioner proceeded to a bar where he met with two other individuals (Co-Defendants Brown and O'Brien) for approximately 20 to 30 minutes.

The DEA surveillance team, monitoring the activities of the three men in the bar, witnessed nothing significant. The three individuals left the hotel, and once in their vehicles, returned to the service station where Petitioner Lee had originally serviced his vehicle. Co-Defendants Brown and O'Brien were driving a Chevrolet Blazer bearing Oregon license plates.

While in the service station lot, the Blazer was parked next to the Cadillac. The Co-Defendants O'Brien and Brown walked to the rear of the Cadillac, whereupon they unhooked the U-Haul trailer. They proceeded to hook the trailer to the back of the Chevrolet Blazer. The surveillance team's view of the incident was obstructed and the lighting at this time of night was less than perfect. They were unable to discern any significant exchanges between the parties.

The Co-Defendants Brown and O'Brien returned to the Chevrolet Blazer and drove to the west end of the parking lot. The Agents concluded that the vehicles were leaving the area. At this time, the three defendants were arrested and charged with unstated narcotics violations.

The three Defendants were advised of their constitutional rights pursuant to the *Miranda* decision from a card which one of the DEA Agents carried with him. The three

individuals, Lee, Brown and O'Brien were found to have understood their rights.

At this time, one or two of the Defendants, who were unable to be identified by the DEA Agents, asked to speak to an attorney. At this time, the questioning was cut off and the Defendants were transported to the Sparks County Jail.

Three search warrants were issued by Judge Harold O. Taber, United States Magistrate. The warrants authorized the search of a briefcase taken from the Chevrolet Blazer as well as a search of the trunk of the Cadillac and U-Haul trailer.

The briefcase contained $39,500 in cash as well as a loaded revolver. The search of the Cadillac produced 12 one-pound packages of amphetamine powder. Five stolen slot machines were found in the U-Haul trailer. In addition, Petitioner's fingerprints were lifted from one of the machines.

At the Sparks Jail, Petitioner was advised that he had a right to an attorney, and a DEA Agent proceeded to question Petitioner. At this time, Petitioner made incriminating admissions to the Agent. The admissions, highly inculpatory in content, were admitted into evidence at trial.

Following a jury trial, the Petitioner was convicted of possession with intent to distribute a controlled substance and conspiracy to possess with intent to distribute a controlled substance. The Petitioner received a sentence of four years plus special parole of two years as to Count

Three, and three years plus two years special parole as to Count Five, to run consecutively.

REASONS FOR GRANTING THE WRIT

The opinion of the Ninth Circuit Court of Appeals summarily dismissed the questions on appeal. There is an urgent need to review the record regarding these issues. Without citing any applicable case law authority, the Court of Appeals arbitrarily concluded that there was no merit in any of the Petitioner's contentions. This contention of the Ninth Circuit Court of Appeals flies directly in the face of well-established case law which has emanated from the United States Supreme Court.

Counsel is mindful of the fact that this Court is one of limited jurisdiction. As such, it is within the discretion of the Justices to deny a Writ of Certiorari. However, the holding of the Court of Appeals in the present case is repugnant to the laws of these United States. The issues involved in this case are sufficiently significant to warrant the Court's attention. The review by the Ninth Circuit Court of Appeals was completely inadequate. When an individual is to be deprived of his liberty in a federal penitentiary, the reviewing court must do more than summarily dismiss an appeal. The existing case law regarding the issues to be addressed in his brief are directly on point and were obviously overlooked on appeal.

Petitioner seeks full review by this Court. Alternatively, Petitioner seeks a grant of certiorari and remand to the United States Court of Appeals for the Ninth Circuit for

reconsideration and findings which comport with the established constitutional principles found in this Petition.

I

DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE

The affidavit relied upon by the District Court, as well as the Ninth Circuit Court of Appeals, is based entirely upon information provided by an untested informant, Kenny Anderson. The statements elicited from Anderson were mere conclusions and conjectures, based on nothing more than hunches. Anderson's statements failed to reveal any facts from which a disinterested Magistrate could infer probable cause to arrest the Petitioner. An appropriate starting point for review of the case law, defining the probable cause requirement for a warrantless arrest, is *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In the majority opinion in *Aguilar,* the Court concluded that the affidavit in question did not meet the stringent requirements established by the Fourth Amendment. The decision stated:

> ". . . The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained herein' it does not even contain an 'affirmative allegation that the affiant's unidentified source' spoke with personal knowledge. For all that appears, the source here merely *believed or concluded* that there were narcotics in petitioner's possession. [Emphasis added.] . . . The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some

> of the underlying circumstances from which the officer concluded that the informant, . . . was credible or his information reliable . . . Otherwise, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime. . . ." At 113-114. [Citations omitted.]

The above-cited quotation illustrates why the affidavit in the present case does not meet the two-pronged test of *Aguilar*. The first prong of Aguilar, "basis-of-knowledge," requires that facts be revealed which will allow the judicial officer making the probable cause determination to determine if the informant had a basis for his allegations. The second prong of *Aguilar*, the "veracity" prong, requires that information be brought to the attention of a neutral magistrate to allow him to determine the credibility of the informant or, in the alternative, the reliability of the information presented.

It is the contention of the Petitioner that the affidavit issued by the magistrate in the instant case does not measure up to the threshold requirements for *Aguilar* or its progeny.

A further refinement of the basis-of-knowledge test established in *Aguilar* is found in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The *Spinelli* decision holds that probable cause must be shown on the basis of facts rather than mere conclusions. Justice White stated in *Spinelli:*

> "Where information has been obtained from someone else, where the officer's information is hearsay, no war-

> rant should issue absent good cause for crediting that hearsay." At 423-424. (1969, White, J., concurring.)

In the instant case, Anderson failed to provide facts upon which an arrest could be made, but instead, provided mere conclusions and suppositions based upon his relationship with Petitioner Lee. There is no indication in the affidavit that the informant had any personal knowledge of any of the specifics cited in the affidavit. Pertinent language in *Spinelli* fits the situation at hand:

> ". . . This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar or could have been a casual rumor circulating in the underworld." At 416.

In the case at bar, the information provided the DEA Agents in Las Vegas was nothing more than casual observations without any specific, detailed accounting of the alleged narcotics deals.

In the absence of personal observations provided by the informant, the Court in *Spinelli* found that a sufficient basis for the information provided by the informant could be gleaned from the detailed information which he had provided in the past. For instance, where:

> "the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor. . . ." At 416.

In *United States v. Larkin*, 510 F.2d 13 (9th Cir. 1974), the facts of the case are strikingly similar to the case at bar. Through an informant's tip, Larkin was arrested by Drug Enforcement Officers. The question addressed by the

Ninth Circuit dealt with the informant's basis for believing that a narcotics transaction was transpiring. Judge Hufstedler, writing for the panel, stated:

> "A statement that a vehicle of a described make with an identified license number will be proceeding toward Los Angeles from El Centro at a certain time is information that could be readily obtained by a bystander observing the vehicle on the road from El Centro to Los Angeles, . . . Nothing about the described features of the car or its direction points to anything suspicious, let alone criminal. That a vehicle matching the description was spotted along a highway from El Centro in the general direction of Los Angeles, corroborates nothing except, possibly, the ability of the informant accurately to relay what he has seen or what he has overheard. No hint is given thereby that the informant was truthful in reporting that the vehicle contained contraband. Nor does the observation supply any information about how the informant knew that contraband was being transported." At 15.

Here, the officers had no evidence, save the information of an untested informer that a crime was being committed by the Petitioner. The mere fact that the Petitioner was driving an automobile with a U-Haul attached to the back end on a public highway is hardly worthy of attention in this day and age of mobility.

Therefore, it would appear from the language excerpted from the *Larkin* opinion, as well as the preceding cases of *Aguilar* and *Spinelli,* that Kenny Anderson's "basis of knowledge" regarding the exchange of stolen slot machines for drugs provides no basis for a determination of probable cause.

If no showing is made as to an informant's basis for information, then the first prong of *Aguilar* has not been established with sufficiency, and then the Court must consider the second prong, or the reliability factor.

This Court has enunciated several ways in which the reliability of an informant may be tested. In *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971), the majority held:

> "The accusation by the informant was plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself." At 580.

In this case, one must postulate: What statements may be construed as declarations against Anderson's interest? Petitioner submits that Anderson's statements are not declarations against interest and do not establish the reliability required to meet the test in *Harris.* In the instant case, the informant, Kenny Anderson, had already been convicted of burglary of the slot machines. Therefore, double jeopardy attaches and the Defendant may not be retried.

Under the circumstances of the present case, it must be asked, "How reliable could Kenny Anderson be?" If attention is directed to the character make-up of typical informants, they are usually criminals, drug addicts, even pathological liars. These people, obviously, give information for reasons other than the "call of civic duty." The motivating factors behind why an informant gives information include offers of immunity or sentence reduction in exchange for cooperation, as well as motives such as revenge, or the hope of eliminating criminal competition.

Kenny Anderson was serving time for the burglary of the stolen slot machines. In addition, the facts state he was a user of various kinds and amounts of drugs. Finally, Anderson was an untested source of information. The informant, in the instant case, has not demonstrated any history of prior dealing with the DEA Agents nor has he established his reputation as a truthspeaker. Therefore, his reliability is highly doubtful.

Additionally, the arresting officers failed to corroborate the information supplied by Anderson. Under *Spinelli*, the Court concluded that the corroboration of the informant's tips—police surveillance showing that Spinelli had access to the apartment which contained the phones from which Spinelli was taking bets—was insufficient to overcome the failure to satisfy directly either of the two prongs of *Aguilar*. The Court went on to state:

> "This corroboration cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way." At 417.

The observations made by the DEA Agents in Las Vegas, as well as Reno, were not of themselves so highly suspicious as to justify making an arrest based on Anderson's information. See also: *Whiteley v. Warden*, 401 U.S. 560, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971).

Assuming *arguendo* that the Court finds that the information supplied by Anderson to the DEA Agents meets the requirement of *Aguilar* and *Spinelli*, Petitioner wishes to draw the attention of this Court to the age of Anderson's information.

The affidavit, signed by the DEA Agent, was based on information almost five months old. Most striking about the evidence disclosed in the affidavit is the lapse of time between when the informant obtained the information and the application for the search warrant.

In the leading case of *Sgro v. United States*, 287 U.S. 210, 53 S.Ct. 140 (1932), Chief Justice Hughes stated very succinctly:

> ". . . The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. [Citing cases.] . . . *While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.* Note 9, at 210." [Emphasis added.]

In *United States v. Neal*, 500 F.2d 305 (10th Cir. 1974), a member of an auto theft ring described his activities to an F.B.I. agent, said activities conducted from November 1970 to August 1971. The Agent's affidavit in support of his search warrant application was not executed until October 1971, some three months subsequent to the informant's participation in the auto theft ring.

The Tenth Circuit affirmed the District Court's suppression of the evidence produced by the search. "We are convinced," said the Court, "that the remoteness of the information relied upon is such that it will not support the issuance of a valid warrant. The Fourth Amendment con-

templates that probable cause for the issuance of a search warrant must exist at the time the search is sought to be made. Probable cause existing some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the affidavit was filed." (500 F.2d at 309.)

It is submitted that an affidavit that is silent as to dates and without any specific facts lending a sense of immediacy to its issuance other than a bare allegation of the present commission of crime is inadequate to establish the timeliness required for issuance of a search warrant.

In the present case, to permit a finding of probable cause from the stale conclusions and hunches provided by the informant would require a magistrate to build inference upon inference so as to establish a basis for his belief that probable cause exists.

II

WHETHER PETITIONER'S WARRANTLESS ARREST, BASED ON INFORMATION FROM AN UNTESTED SOURCE, MEETS THE REQUISITE REQUIREMENT FOR PROBABLE CAUSE ESTABLISHED BY THE UNITED STATES SUPREME COURT IN AGUILAR v. TEXAS

The information provided by the informant, Kenny Anderson, in the instant case, led to the arrest of the Petitioner. As stated above in Part I, the information which led to the arrest of the Petitioner did not meet the stringent criteria established in *Aguilar* and *Spinelli*. Therefore, the Agents lacked the probable cause necessary to arrest the Petitioner.

In *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), this Court found that evidence unlawfully seized by the Government cannot be used against the Defendant.

The United States Supreme Court has been consistent in their rulings regarding the use of illegally obtained evidence to establish probable cause for the arrest as well as seizure of individual's property. The landmark case of *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), made it clear that the exclusionary rule may not be circumvented by the indirect use of illegally obtained evidence. Therefore, applying the rationale of *Wong Sun* to the present case, all "fruits of the poisonous tree" must be disregarded and excluded from providing the requisite evidence to establish probable cause. In the present case, without the tainted evidence supplied by the informant, the justification to arrest as well as subsequently search Petitioner's vehicle was nonexistent.

The information relied upon for the warrantless arrest was the same as that relied upon for the search warrant. The information suffers from the same defects of vagueness, unreliability of source and staleness of information. The DEA Agents were unable to provide even a hint as to why they believed a narcotics transaction was taking place. The Agents repeatedly testified that they saw nothing suspicious regarding the transaction between the three Defendants in the parking lot of the service station.

Additionally, the cocaine found on the person of Defendant Brown in no way provides probable cause to arrest Defendant Lee and to seize the automobile he was driving.

Mere presence is insufficient to prove possession; *Williams v. United States,* 361 F.2d 280 (5th Cir. 1966); *United States v. Lopez-Ortiz,* 492 F.2d 109 (5th Cir. 1974). It is insufficient to prove any inchoate crime in connection therewith. Once the slot machines were confiscated from the Chevrolet Blazer, the Agents had no reason to believe that the Cadillac driven by Petitioner contained any contraband.

III

WHETHER THE COURT OF APPEALS ERRED IN ADMITTING THE ORAL STATEMENT GIVEN BY PETITIONER SUBSEQUENT TO HIS ARREST IN DIRECT CONTRAVENTION OF MIRANDA V. ARIZONA

Following his arrest, the Defendant was interrogated in violation of *Miranda v. Arizona,* 394 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). For a complete understanding of the issues presented, a more detailed recitation of the facts is required.

Defendant Lee and Co-Defendants Brown and O'Brien were arrested collectively at Sierra Sid's Truck Stop in Sparks, Nevada, by Agents of the DEA. Agent Cameron read them their *Miranda* rights from a preprinted card immediately thereafter:

> "I read the card *to all three individuals. They were gathered in a group. I read the card to all three individuals.* Each individual understood what I read from the card, *and one of the individuals—I don't recall who*—stated they didn't wish to make a statement." [Emphasis added.]

Cameron then testified that Defendant Lee, in particular, acknowledged that he under his *Miranda* rights, and was

then asked if he could recall which of the three men indicated his desire to remain silent. Agent Cameron's testimony in response was:

> *"I don't recall who stated that* [that he would like to have a lawyer before questioning]. I recall as I finished the rights *one* of the individuals stated they wanted to talk to a lawyer before they said anything. "I said, 'That's fine,' and they were transported [to the Sparks Police Department]." [Emphasis added.]

On cross-examination, Defendant Lee's counsel attempted to discover the identity of the one man who spoke up:

> "Mr. Semenza: Which one?
>
> "Agent Cameron: I don't remember.
>
> "Mr. Semenza: Possible it was more than one?
>
> "Agent Cameron: *It was more than one, because I only remember one person saying it.*" [Emphasis added.]

This last response is curious at best, but it is at least clear that the three men were advised of their rights collectively, and at least one explicitly declined to speak. At this point, it was apparently assumed by the Agents that one spoke for all, because the Defendants were immediately transported to the police station.

The Petitioner was re-Mirandized while in the Sparks County Jail; however, the trial judge held that the second *Miranda* warning was defective in that it failed to warn of the possibility of statements being used against the Defendants in court. Erroneously, the trial judge held that the first *Miranda* warning was sufficient and that Petitioner

Lee had waived his rights, thereby rendering any statements made by him to be admissible.

It appears that the trial court, as well as the Court of Appeals, applied an erroneous standard for determining whether the Petitioner had made a voluntary and knowing relinquishment of his right to remain silent. There are a long line of cases which make it clear that a knowing and voluntary relinquishment of abandonment of a right in each case depends "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938); *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

It would appear that in the present case, when one of the Defendants, who was unknown to the Agents, requested an attorney, all questioning should have ceased until an attorney was present. Upon further questioning at the Sparks Jail, Petitioner did not knowingly or voluntarily waive his rights to remain silent.

In denying Petitioner's Motion to Suppress, both the trial court and the Court of Appeals found the admission to have been voluntary without separately focusing on whether Petitioner had knowingly and intelligently relinquished his right to counsel. *Edwards v. Arizona,* ..... U.S. ....., 101 S.Ct. 1880 (1980), the most recent articulation of *Miranda* applies directly to the facts of the instant case. This Court, in *Edwards* focused on the voluntariness of Edwards' admission. The majority opinion held "when

an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." In the instant case, it would appear that although the individual who requested an attorney upon arrest was unidentified, the fact that one requested counsel should be imputed to the other individuals. If such is the case, it is axiomatic that once right to counsel has been invoked, after *Miranda* warnings are given, a mere resumption of questioning at the Sparks Jail does not establish a valid waiver per *Edwards*. See *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); and *Rhode Island v. Innis*, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980). Therefore, from the above-cited cases it stands to reason that a re-interrogation of the Petitioner without the benefit of requested counsel is clearly inconsistent with *Miranda* and does not amount to a valid waiver. Therefore, the incriminating statements made by the Petitioner are inadmissible.

In addition, the Court of Appeals erroneously relied on *Fare v. Michael C.*, 442 U.S. 707, 61 L.Ed.2d 197, 99 S.Ct. 2560 (1979), in finding that the Petitioner had voluntarily relinquished his right to counsel. The holding in *Fare* is totally inapposite to the facts of the instant case. Fare was denied permission to see his probation officer, not an attorney. More importantly, once denied his right to see his probation officer, Fare *expressly* waived his right to an attorney before he incriminated himself.

The Court held:

> "Moreover, after his request to see his probation officer had been denied, and after the police officer once more had explained his rights to him, respondent clearly expressed his willingness to waive his rights and continue the interrogation . . . There was no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be" At 727.

Therefore, it would appear from the language of the *Edwards* decision last term, as well as the inapplicability of the *Fare* decision to the case at hand, Petitioner's incriminating statements were clearly violated, per the holding in *Miranda v. Arizona, supra.*

The statements elicited from Petitioner Lee are damaging in content. While at the Sparks Jail, Lee was informed that if he cooperated with the Agents, his cooperation would be passed on to the judge. Lee responded:

> "You must want to get me killed. Besides getting me killed, my wife wouldn't live with me, because she wouldn't want to live with a snitch. . . . I'd rather do my time than take a chance like that. . . . I was out of the business last week, and I was talked into getting involved for this last load."

It is apparent from the content of the statements by Petitioner Lee that he incriminated himself before further questioning was cut off. The statements elicited at the Sparks Jail cannot be used against the Petitioner. The Government has failed to meet its burden of demonstrat-

ing that the statements were in conformity with the *Miranda* decision. In addition, there is no showing that Petitioner made a clear, knowing, and intelligent waiver of his constitutional rights against self-incrimination.

CONCLUSION

In order for an arrest and search to be viable under the dictates of the Fourth Amendment, it is incumbent upon police officers to rely on credible and detailed information.

In the instant case, the scanty set of facts provided by a clearly unreliable source, are not sufficient to support the constitutional requirement needed to establish probable cause. The Court must keep in mind the overwhelming case law supporting Petitioner's contention which was disregarded on appeal by the Ninth Circuit.

The claim that Petitioner's incriminating statements were voluntarily waived was in contravention of *Edwards v. Arizona.*

It is incumbent upon the Ninth Circuit to take heed of the *Edwards* case. Apparently for reasons unknown, the Ninth Circuit chose to ignore *Edwards.* It is requested that in light of the *Edwards* holding, as well as the inapplicability of the *Fare* case, this Court take a thorough and searching look at the case law cited.

Review of the above-mentioned issues is paramount to a fair analysis of this case. Each of the substantive issues involved herein has not been properly addressed on appeal.

Failure to review the Ninth Circuit's decision will mean that Petitioner's conviction will be based on insufficient evidence clearly unsupported by the overwhelming majority of case law.

Respectfully submitted this 19th day of January, 1982.

Lawrence J. Semenza
Counsel for Petitioner
Clifford Doyle Lee

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States of America,
Plaintiff-Appellee,

vs.

Harry O'Brien, Clifford Doyle Lee
and James Robert Brown,
Defendants-Appellants.

Nos. 80-1170, 80-1261, 80-1319
D.C. No. 79-55

Appeal from the United States District Court
for the District of Nevada

Edward C. Reed, Jr., District Judge, Presiding
Argued and Submitted July 15, 1981

Filed September 10, 1981

MEMORANDUM

Before: NELSON and NORRIS, Circuit Judges, and
REAL,* District Judge

Appellants O'Brien, Brown, and Lee were convicted, after trial by jury, of possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841 (a)(1), and conspiracy to possess and distribute a controlled substance, in violation of 21 U.S.C. § 846. O'Brien and Brown were convicted, in addition, of interstate travel in aid of racketeering activity (distribution of a controlled substance), in violation of 18 U.S.C. § 1952(a)(3). On appeal, the appellants allege a long list of errors by the

*The Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

trial court. We find no merit in any of the appellants' contentions and, accordingly, we affirm the convictions.

Based on our independent review of the record, we uphold the trial court's conclusion that the officers had probable cause to make warrantless arrests of the appellants. Our review also convinces us that the affidavits in support of the search warrants are sufficient to demonstrate probable cause. *See United States v. Fried*, 576 F.2d 787, 790-91 (9th Cir. 1978). The seizure and searches of the Blazer were clearly lawful under *United States v. Johnson*, 572 F.2d 229 (9th Cir.), *cert. denied*, 437 U.S. 907 (1978).

The admission of certain testimony at trial did not violate, under *Bruton v. United States*, 391 U.S. 123 (1968), any appellant's right to confrontation. There is no violation of *Bruton* where, as here, the testimony in question is not "powerfully incriminating." *See United States v. Buckner*, 610 F.2d 570, 574 (9th Cir. 1979).

The admission of Lee's post-arrest statements did not violate his *Miranda* rights. The trial court properly found a waiver by Lee. *See Fare v. Michael C.*, 442 U.S. 707 (1979).

The appellants remaining claims—prosecutorial misconduct, insufficiency of the evidence, insufficiency of voir dire, ineffectiveness of counsel, factual misstatements by the trial court, and double jeopardy—are similarly unpersuasive. None find any support whatsoever in the record.

AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

United States of America,
Plaintiff-Appellee,

v.

Harry O'Brien, Clifford Doyle Lee and
James Robert Brown,
Defendants-Appellants.

Nos. 80-1170, 80-1261, 80-1319
D.C. No. 79-55

Order

Filed Nov. 12, 1981

Before: Nelson and Norris, Circuit Judges, and Real*, District Judge

The panel as constituted in the above case unanimously voted to deny the petitions for rehearing of Defendants-Appellants Lee and Brown, and rejects their suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The said petitions for rehearing are Denied and the suggestions for rehearing en banc are Rejected.

*The Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.